



**CITY OF LODI
COUNCIL COMMUNICATION**

AGENDA TITLE: Authorize the City Manager to execute a Settlement Agreement in the matter of *Michels Corporation d/b/a Michels Pipeline (Gelco Services . . .) v. Crutchfield Construction Company, et al.*, San Joaquin County Superior Court Case No. CV 028006, regarding the City's Water and Wastewater Main Replacement Program, Project No. 2.

MEETING DATE: July 5, 2006

PREPARED BY: Janice D. Magdich, Deputy City Attorney

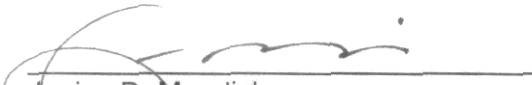
RECOMMENDED ACTION: Authorize the City Manager to execute a Settlement Agreement in the matter of *Michels Corporation d/b/a Michels Pipeline (Gelco Services . . .) v. Crutchfield Construction Company, et al.*, San Joaquin County Superior Court Case No. CV 028006, regarding the City's Water and Wastewater Main Replacement Program, Project No. 2.

BACKGROUND INFORMATION: Michels Corporation d/b/a Michels Pipeline (Gelco Services . . .) brought an action in San Joaquin County Superior Court (the Action) against Crutchfield Construction Company, its bonding companies and the City based on a Stop Notice filed by Michels (a sub-contractor of Crutchfield) concerning the City's Water and Wastewater Main Replacement Program, Project No. 2 (the Project).

A settlement of the Action has been reached by the parties in which Michels will be paid under the Project payment bonds in consideration for the dismissal with prejudice of the pending Action. Under the terms of the settlement, City will pay the balance owing under the Project contract to Fidelity and Guaranty Insurance Company (FGIC) (Crutchfield's bonding company), based in part on securing releases for all but one Project stop notice. As to the remaining Project stop notice, all but the sum of \$1,164.59 has been paid by FGIC to A. Teichert & Sons. A dispute exists between FGIC and A. Teichert & Sons as to the remaining balance. In consideration for City's payment of the contract balance to FGIC, FGIC, under the terms of the Settlement Agreement, shall defend and indemnify the City from and against any claims, demands, suits, or damages arising out of such payment. This office is of the opinion that a suit by Teichert for additional payment under its stop notice is unlikely.

Execution of the Settlement Agreement, a copy of which is attached, will resolve the pending Action.

FUNDING: None, over and above the balance owing under the previously approved Project contract.


Janice D. Magdich
Deputy City Attorney

Attachment – Proposed Settlement Agreement

City/CounCom/Misc/CrutchfieldMichaelsSettlement.doc

APPROVED: 
Blair King, City Manager

SETTLEMENT AGREEMENT

1. **DATE OF AGREEMENT:** The effective date of this agreement ("Agreement") is May 3, 2006.

2. **PARTIES TO AGREEMENT:** This Agreement is made by and between the following parties (collectively, the "Parties"):

A. **MICHELS CORPORATION, [d/b/a MICHELS PIPELINE CONSTRUCTION (Gelco Services, a Division of ...)] ("MICHELS")
Plaintiff in the Action**

Michels Corporation
Michels Pipeline Construction
817 W. Main Street
Brownsville, WI. 53006

With a copy to MICHELS' attorneys:

Pamela A. Lewis, Esq.
Cook Brown, LLP
555 Capitol Mall, Suite 425
Sacramento, California 95814

A. David Stegeman
Chief Legal Officer
Michels Corporation
817 Brownsville, WI. 53006

B. **CRUTCHFIELD CONSTRUCTION COMPANY ("CRUTCHFIELD")
Defendant in the Action**

Harold Crutchfield
Crutchfield Construction Company
2655 E. Miner
Stockton, California 95205

With a copy to CRUTCHFIELD's attorney:

Michael E. Babitzke, Esq.
6 South El Dorado Street, Suite 305
Stockton, California 95202

C. **FIDELITY AND GUARANTY INSURANCE COMPANY ("FGIC") and
THE UNITED STATES FIDELITY AND GUARANTY COMPANY
("USFGC") Defendants in the Action**

Pete Fjellstad and Sherri Cooper
St. Paul Travelers Bond
31919 First Avenue South, Suite 100
Federal Way, Washington 98003

with copy to FGIC's and USFGC's attorney:

Jonathan J. Dunn, Esq.
Michael E. Fox, Esq.
Sedgwick, Detert, Moran & Arnold LLP
3 Park Plaza, 17th Floor
Irvine, California 92614

D. **CITY OF LODI**
Defendant in the Action
Janice D. Magdich
Deputy City Attorney
City of Lodi
333 E. Pine Street
Lodi, California 95240

3. **PURPOSE OF AGREEMENT:** The purpose of this Agreement is to record the terms of the Parties' agreement to settle MICHELS' claims against CRUTCHFIELD, LODI, FGIC, and USFGC set forth in the complaint filed in the Superior Court of the State of California, County of San Joaquin, Case No. CV028006 (the "Action"). Attached herewith as **Exhibit "1,"** and incorporated herein by this reference, is a true and correct copy of MICHELS' complaint.

4. **ACKNOWLEDGMENTS:** The Parties acknowledge that none of the Parties have been induced to execute this Agreement by any representations, agreements, or understandings not expressly contained in this Agreement. For example, but without limitation, each of the Parties acknowledge and affirm that no inconsistent or conflicting understanding, agreement, or representation has been made by, or on behalf of, any of the other Parties with respect to the following: (a) the Agreement's payment provisions; (b) further accommodations for any of the Parties; (c) any modifications or alterations to this Agreement; or (d) this Agreement's enforceability, terms, and/or conditions. Furthermore, the Parties hereby acknowledge and affirm that the recitals herein are contractual and not merely recital.

RECITALS

1. CITY OF LODI and CRUTCHFIELD entered into a written agreement (the "Prime Contract") for a public work of improvement known as "City of Lodi's Water and Wastewater Main Replacement Program, Project No. 2" (the "Project").

2. CRUTCHFIELD signed a General Agreement of Indemnity ("Indemnity Agreement") as a partial inducement for FGIC to issue construction bonds on CRUTCHFIELD's behalf.

3. FGIC issued a payment bond ("Payment Bond") on behalf of its principal, CRUTCHFIELD, related to the Project.

Settlement Agreement

4. Pursuant to the Indemnity Agreement, CRUTCHFIELD assigned FGIC all of its rights, titles, and interests to all monies on FGIC bonded projects, including, but not limited to, the Project.

5. MICHELS' alleges that MICHELS is, and at all relevant times was, a corporation (a) duly organized and existing under and by virtue of the laws of the State of Wisconsin, (b) authorized to do business in the State of California, and (c) properly licensed as a construction contractor in the State of California.

6. MICHELS' further alleges that on or about August 24, 2004, it entered into a written subcontract agreement ("Subcontract") with CRUTCHFIELD to perform construction services at the Project.

7. MICHELS' further alleges that MICHELS assumed and obtained all rights to the Gelco Services, Inc.'s May 12, 2004 proposal and any subsequent subcontract relationship with CRUTCHFIELD related to the Project when MICHELS purchased the assets of Gelco Services, Inc. in July 2004 at which time the Gelco Services assets purchased became owned and operated by MICHELS.

8. MICHELS' further alleges that MICHELS furnished labor, services, equipment and/or materials related to the installation of pipe and sewer laterals at the Project, *inter alia*.

9. MICHELS' further alleges that CRUTCHFIELD agreed to pay MICHELS for its work at the Project.

10. MICHELS' further alleges that CRUTCHFIELD issued various change/extra work orders to MICHELS and MICHELS performed same.

11. MICHELS' further alleges that MICHELS has performed all conditions, covenants and promises under the Subcontract

12. MICHELS' further alleges that the reasonable value of all labor, services equipment and/or materials, including all alleged change/extra work orders, that MICHELS provided to the Project is \$433,678.13.

13. MICHELS' further alleges that MICHELS was paid \$123,388.67 by CRUTCHFIELD and no more related to MICHELS' work and materials supplied to the Project.

14. MICHELS' further alleges that CRUTCHFIELD breached the Subcontract by failing to make payment due to it for work performed and materials supplied by MICHELS to the Project.

15. MICHELS' further alleges that MICHELS has been damaged in the principal sum of \$310,289.46, plus interest, statutory prompt payment penalties, attorney fees, and costs.

16. MICHELS' further alleges that MICHELS properly served a stop notice ("Stop Notice"), totaling \$238,252.01, and complied with all statutory and procedural requirements related to stop notices.

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17. MICHELS' further alleges that FGIC issued the Payment Bond to provide for the payment of MICHELS' claims against the payment bond for materials and labor supplied to the Project by MICHELS and for such statutory prompt payment penalties, interest, attorney's fees and costs as the payment bond surety may be obligated to pay pursuant to law and that MICHELS complied with all statutory requirements for recovery under said payment bond.

18. MICHELS further alleges that USFGC issued a contractor license bond ("License Bond"), subjecting USFGC to liability for CRUTCHFIELD's alleged violations of various provisions of California Business and Professions Code §7000 et. seq., and that USFGC is liable for CRUTCHFIELD's alleged violations of same.

19. Defendants CRUTCHFIELD, FGIC and USFGC filed an answer denying Plaintiff MICHELS' claims as stated in the Action.

20. FGIC made the following payments, totaling \$75,951.62, to the following CRUTCHFIELD subcontractors and suppliers on the Project: (a) \$58,355.47 to Edward S. Walsh Co.; (b) \$6,277.50 to Johnson Concrete Sawing; (c) \$7,009.21 to Teichert Aggregates; (d) \$4,309.44 to Trench Plate Rental Co. In exchange for said payments, FGIC received unconditional waivers and releases from Edward S. Walsh Co. and Trench Plate Rental Co. FGIC also received a conditional waiver from Johnson Concrete Sawing & Demo, Inc., totaling \$6,277.50. FGIC did not receive any waiver and/or release from Teichert Aggregates. Attached herewith as **Exhibit "2,"** and incorporated herein by this reference, are true and correct copies of the previously mentioned checks, waivers, and releases.

21. Due to the uncertainty and expense of litigation, the parties desire to settle, compromise, resolve, the claims except as noted herein below.

NOW THEREFORE, in consideration of the mutual promises provided herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

A. **PAYMENT TO MICHELS:** FGIC or USFGC shall pay MICHELS Three Hundred Forty-Eight Thousand Dollars (\$348,000.00) ("Settlement Payment") on or before May 25, 2006, or the date of this Agreement, whichever is sooner. Counsel for Michels shall hold such payment in trust pending all parties' signature of this Agreement.

B. **PAYMENT TO FGIC:** The CITY OF LODI represents, and FGIC relies thereon, that as of the date of this Agreement: (a) the amount of the Prime Contract, including all approved change orders, is the sum of \$2,260,983.71; (b) the CITY OF LODI has previously paid CRUTCHFIELD the amount of \$1,870,686.70; (c) the CITY OF LODI is holding as retainage on account of stop notices the sum of \$391,528.18; and (d) the CITY OF LODI is holding the sum of \$19,450.83 as Progress Payment No. 11, pursuant to the terms of the Prime Contract and applicable law. Thus, the "Contract Balance" is \$410,979.01 (amount of Prime Contract including change orders, less amounts previously paid), which should equal all amounts withheld. The CITY OF LODI shall pay to FGIC the Contract Balance within thirty days from the date of this Agreement. CRUTCHFIELD hereby consents to the CITY OF LODI's payment of all Contract Balance to FGIC.

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C. **FGIC'S AGREEMENT TO DEFEND AND INDEMNIFY:** In exchange for the CITY OF LODI's payment of all Contract Balance to FGIC, FGIC shall defend and indemnify the CITY OF LODI from and against any claims, demands, suits, or damages arising out of the CITY OF LODI's payment to FGIC by stop notice claimants Johnson Concrete Sawing and A. Teichert & Sons. The CITY OF LODI hereby consents to joint representation in the event defense of such claims is needed, and will reasonably waive any conflicts of interest requested from joint counsel of FGIC's selection related to such defense.

D. **DISMISSAL OF ACTION WITH PREJUDICE:** Within five (5) days of the successful negotiation of the Settlement Payment, MICHELS shall file a dismissal with prejudice of the entire Action and supply endorsed copies of said document to counsel for each party.

E. **AUTHORITY:** Each of the Parties represents that it is authorized to consent to, to execute, and to perform this Agreement.

F. **NO ASSIGNMENTS:** Each of the Parties represents that it is the sole and lawful owner of all rights, title, and interest in, and to, all rights and claims released or assigned by this Agreement, and that it has not assigned, or transferred, any rights, title, and/or interest to any other person or entity. Further, each of the Parties to this Agreement represents that its obligations under this Agreement do not violate any agreement with any third party to which it is bound.

G. **RELEASES:**

1. **MICHELS' RELEASE:** Immediately upon successful negotiation of the check for the settlement payment described above, MICHELS and its heirs, legal successors, assigns, subsidiaries, divisions or affiliates, grantees, agents, and/or representatives, with the exceptions noted in K, below, does hereby release and discharge the CITY OF LODI, CRUTCHFIELD, FGIC, and USFGC, including any and all of their respective agents, servants, subsidiaries, divisions, or affiliates, employees, attorneys, representatives, predecessors, successors, assigns and assignors from any and all claims, demands, actions, causes of action, obligations, costs, expenses, attorneys' fees, expert witness or consultant fees, damages, penalties, interest, losses and liabilities of whatsoever kind, nature or character, known or unknown, suspected or unsuspected, matured or contingent, which in any way concern or relate to the Subcontract or work and materials supplied thereunder, the Payment Bond, the License Bond, the Stop Notice, and the Action.

2. **CRUTCHFIELD'S RELEASE:** With the exceptions noted in K, below, CRUTCHFIELD, and its heirs, legal successors, assigns, subsidiaries, divisions or affiliates, grantees, agents, insurers, sureties and/or representatives, does hereby release and discharge MICHELS including any and all of its respective agents, servants, subsidiaries, divisions, or affiliates, employees, attorneys, representatives, predecessors, successors, assigns and assignors from any and all claims, demands, actions, causes of action, obligations, costs, expenses, attorneys' fees, expert witness or consultant fees, damages, penalties, interest, losses and liabilities of whatsoever kind, nature or character, known or unknown, suspected or unsuspected, matured or contingent, which in any way concern or relate to the Subcontract or work and

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materials supplied thereunder, the Payment Bond, the License Bond, the Stop Notice, and the Action.

H. **CIVIL CODE §3262 RELEASES AND STOP NOTICE:** Immediately upon receipt of the payment described above, MICHELS will execute and deliver to FGIC and USFGC's counsel, a "Conditional Waiver and Release Upon Payment" and shall execute and deliver a California *Civil Code* §3262 "Unconditional Release Upon Final Payment" related to the amount of the settlement payment upon successful negotiation of the settlement payment.

I. **ASSIGNMENT OF STOP NOTICES:** MICHELS assigns all rights in its Stop Notice to FGIC and USFGC. MICHELS shall provide the CITY OF LODI with an executed "Conditional Waiver and Release" regarding the Stop Notice, and/or an Unconditional Waiver and Release "on condition that any unconditional release be held in trust by the CITY OF LODI and is not effective until and unless MICHELS receives and successfully negotiates the settlement payment from FGIC and USFGC. FGIC and USFGC will only pursue assigned rights in their own names.

J. **CIVIL CODE §1542:** MICHELS, CRUTCHFIELD, FGIC AND USFGC acknowledge that they are familiar with California Civil Code §1542, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him, must have materially affected his settlement with the debtor.

MICHELS, CRUTCHFIELD, FGIC AND USFGC waive, release, and otherwise relinquish any and all rights and benefits which they may have thereunder, or which may be conferred upon them by the provisions of §1542, against each other, other than those limitations on releases and/or reserved claims noted in K, herein below.

K. **LIMITATIONS ON RELEASES/RESERVED CLAIMS:** The Parties do not intend, and this Agreement should not be construed, to release, discharge, or extinguish any obligations arising by statute, contract, equity, or otherwise which CRUTCHFIELD may owe to FGIC, USFGC, and/or their related companies, or the CITY OF LODI. Any and all such obligations are reserved by this Agreement. Additionally, the Parties do not intend, and this Agreement should not be construed, to release, discharge, or extinguish any rights arising from statute, contract, equity, or otherwise which FGIC, USFGC, and/or their related companies, or the CITY OF LODI, have against CRUTCHFIELD. Any and all such rights are reserved and affirmed by this Agreement. Finally, no party releases any claims related to claims for or arising out of any latent deficiencies in the work performed or materials supplied to the Project or claims related to any third party claims for property damage or personal injury but acknowledge and represent that they presently are unaware of any such claims.

L. **CONDITIONAL COVENANTS:** Each Parties' obligations, covenants, and promises under this Agreement are expressly conditioned upon the performance of the other Parties' obligations, covenants, and promises.

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M. **BINDING AGREEMENT:** This Agreement shall be binding upon, and shall inure to, the Parties and their heirs, executors, administrators, representatives, successors, assigns, agents, servants, employees, attorneys, and predecessors.

N. **CONTINUED JURISDICTION:** The Parties agree to request that the court retain jurisdiction over them to enforce the settlement until performance in full of the settlement terms pursuant to Cal. Code of Civ. Pro. Section 664.6.

O. **GOVERNING LAW:** This Agreement shall be interpreted, construed, and enforced in accordance with, and governed by, the provisions and laws of the State of California.

P. **PREVAILING PARTY ENTITLED TO ATTORNEY'S FEES:** The prevailing party or parties in any dispute relating to the interpretation or enforcement of this Agreement shall be entitled to reasonable attorney's fees from the other party or parties.

Q. **FAIR AND REASONABLE TERMS:** The Parties acknowledge that this Agreement is fair and reasonable, and they represent that they consulted with legal counsel before executing this Agreement.

R. **NO THIRD PARTY BENEFICIARIES:** The Parties do not intend to create any third party beneficiaries to this Agreement. Accordingly, neither this Agreement nor any course of conduct by any of the Parties should be construed to establish rights in any person or entity not a Party to this Agreement.

S. **COUNTERPARTS:** This Agreement may be executed in counterparts.

T. **ATTORNEY FEES RELATED TO ACTION:** Except as otherwise limited by this paragraph, each of the Parties shall bear its own attorney's fees and costs in connection with the Action. FGIC and USFGC do not waive their respective rights to recover attorney fees and costs from CRUTCHFIELD.

U. **FACSIMILE SIGNATURE:** The Parties agree that facsimile copies of signatures to this Agreement shall be treated as original signatures, binding each of the Parties to their respective rights and obligations under this Agreement to the same extent as if such facsimile signatures were original signatures.

V. **NOTICE:** Any notice required to be sent hereunder shall be sent to the respective Parties at the addresses listed above.

W. **SEVERABILITY:** In the event that one or more provisions of this Agreement shall be declared to be invalid, illegal, or unenforceable in any respect, unless such invalidity, illegality, or unenforceability shall be tantamount to a failure of consideration, the validity, legality, and enforceability of the remaining provisions contained in this Agreement shall not in any way be affected or impaired thereby.

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X. **ENTIRE AGREEMENT:** This Agreement represents the whole and complete agreement by and between the Parties and shall not be changed, modified, or abridged, except by a subsequent written agreement executed by the Parties. The parties agree that this document consists of negotiated language and that therefore any legal rules or provisions that provide that ambiguities are to be construed against the drafter, are not to be enforced.

IN WITNESS WHEREOF, the Parties execute this Settlement Agreement as of the date last written below.

DATED: May ____, 2006

**MICHELS CORPORATION, d/b/a MICHELS
PIPELINE CONSTRUCTION (Gelco Services a
Division of ...)**

By: _____

DATED: May ____, 2006

**CRUTCHFIELD CONSTRUCTION
COMPANY**

By: _____

DATED: May ____, 2006

**FIDELITY AND GUARANTY INSURANCE
COMPANY**

By: _____

DATED: May ____, 2006

**THE UNITED STATES FIDELITY AND
GUARANTY COMPANY**

By: _____

DATED: May ____, 2006

CITY OF LODI, a Municipal corporation

By: _____
Blair King, City Manager